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To: STEVENS, MARY ANN
Subject: Comments on LSA Document #08-764 (Antidegradation)
Attachments: indantidegcomments123011.pdf; indantidegsuggestedchanges123011.pdf

Attached are comments from Barnes & Thornburg on IDEM's third-notice proposed rule on antidegradation. Please feel free to call or e-mail if you have any questions. Thank you very much.

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COMMENTS ON THIRD NOTICE ANTIDEGRADATION PROPOSAL

- PERMIT LIMIT TRIGGER

The proposed rule requires an antideg review when there is a new or increased loading, even if there is no change in permit limits associated with the change. This is inconsistent with the antideg rules of numerous other States that have been approved by USEPA. Those rules specify that in order for antideg review to be triggered, there must be a request for a new or increased permit limit. That “bright line” test makes sense. It allows all stakeholders to be clear as to when an antideg review will be required – and will not be required. Without that test, there will be significant confusion. Industrial and municipal facilities make frequent changes to their operations, and the discharge levels will increase and decrease as a result, sometimes on a daily basis. Most of the time, these facilities discharge at levels well below their permit limits, and the frequent increases and decreases do not change that status – discharge levels stay in compliance with limits. The operators understand that if a particular change will require a new or higher permit limit, then they will have to apply for a permit modification, and at the same time, they will need to assess whether the increase is significant enough to require antideg review.

But under the proposed rule, the operators also have to assess the possibility of triggering antideg review whenever they make any change in their operations that leads the discharge levels to be slightly higher than they were immediately before the change, even if the discharge goes from 50% of the permit limit to 51% of the permit limit. This will create significant uncertainty, and will cause dischargers to sometimes “guess wrong” and then be charged later with not complying with antideg requirements. Moreover, this substantial expansion of antideg review is not required by Federal law – there is no requirement in the CWA or EPA’s rules that prohibits use of a permit limit trigger – and is unnecessary to protect the environment. As long as the discharger is meeting their current technology-based and water quality-based permit limits, they are operating at levels that have been determined to protect water quality, and there is no basis to force them to reduce further. The Board should fix this problem by adding a permit limit trigger into the proposed rule. A suggested language change to address this issue is attached to these comments.

- CUMULATIVE CAP

The proposed rule contains a “cumulative cap” as part of its definition of de minimis increases, which will not be required to undergo antideg review. As a general matter, increases that use less than 10% of the total loading capacity of the waterbody are considered to be de minimis, and we agree with that test. It is based on EPA recommendations that were provided to Indiana and other Great Lakes States when EPA adopted the Great Lakes Initiative – at that time, EPA clearly stated that as to non-BCCs, increases of less than 10% are not significant. At the same time, EPA recommended that a “cumulative cap” of 10% be required – in other words, that once less than 10% of the total loading capacity remains unused, all increases must undergo antideg review. So if a

placing of unnecessary hurdles makes no sense, when the actions covered are ones that we want dischargers to take. For example, one of the former exceptions covers increases that occur due to municipal efforts to control sewer overflows – efforts that are actually required under Federal and State law. By taking away the antideg exception, the proposed rules could actually prevent a discharger from taking actions that are mandated by the CWA itself. The exceptions were appropriate, and the rule should be modified to restore those exceptions. Suggested rule revisions to make this change are attached.

- DE MINIMIS REVIEW WHEN NO NUMERIC CRITERION

The proposed rule requires antideg review for any regulated pollutant. This means that even if a particular pollutant is not covered by a technology-based requirement or a numeric water quality criterion, it can still be subjected to antideg review when there is an increase. In fact, it appears that due to the way in which the rule was constructed, EVERY increase is subject to antideg review if the pollutant at issue is not subject to a numeric water quality criterion. This makes no sense. If a criterion exists, then the rules allow for de minimis increases without antideg review. The definition of de minimis uses the concept of “10% of total loading capacity.” And the “total loading capacity” is determined through a calculation that uses the numeric criterion. So if there is no numeric criterion, then there is no way to define de minimis, and any increase, no matter how small, must undergo a full antideg review. As with other provisions noted above, there is no legal or technical reason for that provision in the proposed rule. If a de minimis provision is appropriate – and it is – then it should be available for any non-BCC pollutant, regardless of whether there is a numeric water quality criterion for that pollutant. To fix this problem, the rule should be amended to provide that if there is no criterion, then IDEM should determine an appropriate water quality value to use instead in determining “total loading capacity,” relying on appropriate studies and data. A suggested rule change to implement this recommendation is attached to these comments.

- CHANGES IN BASELINE LOADING CAPACITY

The proposed rule establishes a “baseline loading capacity,” which is used to determine when an increase goes beyond the “90% rule” discussed above. This baseline is established at the time of the first request for an increased loading for that waterbody, and apparently, the baseline can never change. But this does not recognize that the amount of loading capacity available can change over time. For instance, if a facility shuts down that was discharging to that waterbody, the amount of capacity consumed by that discharge would not become available and “unused.” The rule needs to be changed to specify that if there is a permanent reduction in discharges to the waterbody, then IDEM should adjust the baseline capacity to reflect that change. Suggested language to implement this concept is attached to these comments.

SUGGESTED CHANGES IN ANTIDEGRADATION PROPOSAL

327 IAC 2-1.3-2 (53) "Total loading capacity", is expressed as a regulated pollutant mass loading rate per twenty-four (24) hour period, for the waterbody in the area where the water quality is proposed to be lowered, and means the product of the applicable water quality criterion multiplied by the sum of:

(A) the existing effluent flow;

(B) the proposed new or increased effluent flow; and

(C) either:

(i) the approved alternate mixing zone volume for Lake Michigan; or

(ii) the stream design flow.

If there is no applicable numeric water quality criterion, then the commissioner shall instead determine an appropriate water quality value for use in determining total loading capacity, based on consideration of relevant studies and data.

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327 IAC 2-1.3-4(c) For an HQW except an ONRW, a new or increased loading of a regulated pollutant resulting from the following is exempt from the antidegradation demonstration requirements included in section 5 of this rule:

(1) A new or increased loading of a non-BCC that is a demonstrated de minimis lowering of water quality as shown by the submission of sufficient information that allows the commissioner to verify the de minimis as determined according to the following:

(A) Calculation considerations according to the following:

(i) The proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant. The available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant.

(ii) The benchmark available loading capacity is equal to ~~fifty~~ percent (~~50~~%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant, except that if there is a subsequent, permanent decrease in discharges to that waterbody, the commissioner shall adjust the benchmark available loading capacity to reflect the corresponding increase in available loading capacity.

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327 IAC 2-1.3-5 (a) Any existing or proposed discharger seeking a new or increased discharge that requires a new or increased permit limit and that constitutes a significant lowering of water quality that is not exempt under section 4 of this rule must submit for consideration by the commissioner an antidegradation demonstration that justifies that the proposed new or increased discharge is necessary and

(C) Require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5.

(4) A new or increased loading of an approved non-BCC water treatment additive.

(5) A change in loading of a regulated pollutant:

(A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and

(B) with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed.

(6) A new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems.